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# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-222037.2

DATE: July 3, 1986

MATTER OF: CPT Text-Computer GmbH

## DIGEST:

1. General Accounting Office has jurisdiction under the Competition in Contracting Act (CICA) over a bid protest concerning a procurement of automatic data processing (ADP) equipment and software conducted by the Army, a federal agency as defined in CICA, even where the end user of the ADP resources is a nonappropriated fund activity and no appropriated funds are involved.
2. Challenge to contracting agency's decision to allow extensions of dates for operational demonstrations to only some offerors which requested extensions is timely where issue was raised in a protest to the agency filed within 10 days after the contracting officer confirmed the protester's speculation that some extensions had been granted.
3. Contracting agency acted improperly by granting extensions of dates for operational demonstrations to three offerors while denying the protester's request for extension, where all four offerors asserted the same reason for requesting extensions (proximity in time of major trade fair to which personnel and equipment were already committed). The protester was prejudiced by the agency's unequal treatment of the offerors since the protester had significantly less time to prepare for its demonstration than the offerors who were granted extensions.
4. Contracting agency is not required to obtain a delegation of procurement authority (DPA) from the General Services Administration

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(GSA) under the Brooks Act where the value of the procurement (measured by the proposed awardee's best and final offer) is within the dollar ceilings for blanket DPAs from GSA.

CPT Text-Computer GmbH (CPT) protests any award under request for proposals (RFP) No. PAFNAO-84-R-0004 issued by the United States Army Contracting Agency, Europe for microcomputer systems. CPT contends that it was prejudiced by the Army's unequal treatment of offerors regarding the scheduling of an operational demonstration of the microcomputer systems. CPT also maintains that the Army failed to obtain a delegation of procurement authority (DPA) from the General Services Administration (GSA), as required by the Brooks Act, 40 U.S.C. § 759 (1982). The protest is sustained in part and denied in part.

The RFP, issued by the Army on August 20, 1984, called for the acquisition of microcomputer systems consisting of automatic data processing (ADP) equipment and software. The systems are to be used by the Army's Central Accounting Division, a nonappropriated fund activity which provides accounting support to other nonappropriated fund activities in various military communities in Europe. Eight offerors, including CPT, submitted proposals by March 19, 1985, the due date for initial proposals.

Section L-31 of the RFP, as amended, advised the offerors that the Army reserved the right to require an operational demonstration of the ADP hardware and software proposed. By letter to the offerors dated March 25, the Army confirmed that demonstrations would be required before April 24. By letter dated April 12, the Army advised each offeror of the scheduled date for its demonstration. The schedule allowed two days for each demonstration over a one-month period from April 25-26 to May 20-21. CPT's demonstration was scheduled second, on April 29-30.

On April 15, CPT requested a change in its demonstration date because of a conflicting commitment to the Hannover trade fair, a major exhibition of office automation equipment held annually in Europe scheduled for April 15-26. CPT stated that a great deal of demonstration equipment was to be installed and many personnel had already been committed to the trade fair. (CPT had advised the Army of the possible conflict with the trade fair even before the Army sent the April 12 letter with the demonstration schedule.) Three other offerors whose demonstrations were

scheduled in late April or early May also requested changes in the demonstration dates because of conflicting commitments to the trade fair. By letter dated April 19, the Army denied all four requests, stating that "no changes to the dates of the operational demonstrations can be granted."

On April 23, CPT acknowledged the original demonstration dates of April 29-30. That same day, another offeror renewed its request for an extension of its demonstration date, reasserting the difficulty it would encounter in making the necessary equipment and staff already committed to the trade fair available for the Army demonstration. The Army then reversed its original decision and granted this offeror a one-month extension from the originally scheduled dates of April 25-26 to May 23-24. The extension was granted on April 25, before CPT's demonstration was scheduled to begin on April 29.

The two other offerors who originally had requested extensions also renewed their requests in late April or early May, after CPT had completed its demonstration. The Army granted extensions of approximately one month to these offerors as well. Thus, of eight offerors, four requested extensions based on the proximity of the Hannover trade fair to the scheduled demonstration dates. The Army initially denied all four requests, but later reversed its decision and granted one-month extensions to the three offerors that had renewed their requests for extensions. All demonstrations were completed by June 5.

In mid-October, the contracting officer asked all eight offerors to extend their acceptance periods to December 31. By letter dated October 22, CPT extended its acceptance period as requested. In that letter, CPT also stated that it "had reason to believe" that the Army was conducting discussions with only one offeror and had granted that offeror an extension of time for its demonstration. The Army replied by letter dated December 6, received by CPT on December 9, in which the Army advised CPT that it had been excluded from the competitive range and confirmed that other offerors had been given extensions to conduct their demonstrations. The Army incorrectly stated, however, that all the extensions had been granted after the CPT demonstration was completed; in fact, as discussed above, one extension was granted before the CPT demonstration took place. The Army also stated that the possibility of accommodating the requests for extensions did not become clear until May, the month after the initial requests were made. At that point, according to the Army, CPT had already been determined to be outside the competitive range.

On December 17, CPT filed a protest with the Army challenging the decisions to exclude CPT from the competitive range and to grant extensions to the other offerors. A meeting to discuss the protest allegations was held between CPT and the Army on December 30, during which the Army clarified that the competitive range determination was made in late August, not May, as stated in the Army's December 6 letter. By telex dated December 31, the Army also retracted its statement that extensions were granted only after CPT completed its demonstration; the Army acknowledged that one offeror's request was granted before the CPT demonstration took place. The Army explained its decision to allow the extensions as follows:

"As you implied, the original demonstration schedule designated another firm to demonstrate its system before CPT. Refer to this firm as firm 1. Before any demonstrations, firm 1, CPT and others came to the government asking for delay in demonstration. All requests were denied. Firm 1 later came back to the government with extenuating circumstances that convinced officials that it would be reasonable to change the demonstration date. In effect firm 1 said they could not perform a demonstration. The contracting officer weighed the matters and changed the demonstration date. This decision was based on the situation faced by firm 1 and the consequences the government would face if firm 1's request was denied. After the initial denial CPT did not press the issue of delaying the demonstration or the consequences CPT or the government would face if the dates were not changed."

The Army then denied CPT's protest by letter dated January 28, 1986, received by CPT on January 30.

CPT filed its protest with our Office on February 13. The Army's report on the protest was filed on March 24. At a conference held on March 31, CPT questioned whether the Army had obtained a DPA from GSA under the Brooks Act before issuing the RFP. On April 3, the Army advised that it had not applied to GSA for a DPA. By letter dated April 4, CPT then raised as an additional ground of protest that the Brooks Act required the Army to obtain a DPA before issuing the RFP.

Award has not yet been made.

### Jurisdiction

The Army argues that because the microcomputer systems will be used by a nonappropriated fund activity, our Office lacks jurisdiction under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551 et seq. (Supp. II 1984), to consider CPT's protest. This argument has been considered and rejected by our Office in Artisan Builders, B-220804, Jan. 24, 1986, 65 Comp. Gen. \_\_\_\_\_, 86-1 CPD ¶ 85. As we explained in that decision, our jurisdiction under CICA extends to bid protests challenging procurements conducted by any federal agency; our jurisdiction does not depend on the intended use of the items being acquired or the source of the funds for the acquisition. Here, the procurement is being conducted by the Army, unquestionably a federal agency as defined in CICA, 31 U.S.C. § 3551(3). Accordingly, CPT's protest challenging the procurement is within our jurisdiction under CICA.

### Scheduling the Operational Demonstrations

The protester contends that the Army acted improperly in allowing other offerors an extension of time in which to conduct the required demonstration of ADP hardware and software. As discussed further below, we agree that the Army acted improperly with regard to scheduling the demonstrations and we find that CPT was prejudiced by the Army's unequal treatment of the offerors in this regard.

The Army first contends that CPT failed to raise this issue in a timely manner. We disagree. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1986), CPT was required to raise this issue in a protest to the Army or our Office within 10 days of when CPT knew or should have known of this basis for protest. CPT filed its protest with the Army on December 17, less than 10 days after it received the Army's December 6 letter confirming that extensions had been granted to other offerors. The Army argues that CPT knew that extensions had been granted to other offerors before it filed its protest with the Army, since CPT first raised the issue in its October 22 letter to the contracting officer. In our view, the October 22 letter was intended as a request for confirmation of speculative information CPT had obtained from a source other than the contracting officer. We believe that CPT acted reasonably in seeking to confirm the accuracy of the information before raising the issue in its protest to the Army.

As discussed above, four of the eight offerors requested extensions of the demonstration dates because of conflicting commitments to the Hannover trade fair to be held the week before demonstrations were to begin. The Army, while initially denying all the requests, subsequently reversed itself and granted extensions to the three offerors other than CPT which had renewed their requests for extensions after the Army's initial denial. The decision to grant an extension to one of the three offerors was made before the CPT demonstration took place.

The Army's explanation for its disparate treatment of CPT and the other offerors is that CPT "never claimed that the Hannover trade fair prevented a demonstration." We find this explanation unpersuasive since there is no significant difference in the reasons the offerors gave for requesting extensions. On the contrary, all four offerors relied on the same rationale, the hardship imposed by requiring demonstrations to proceed shortly after the Hannover trade fair. We see no reasonable basis for distinguishing among the offerors when considering their requests for extensions, particularly since the Army decided to reverse itself and grant an extension to one offeror even before CPT's demonstration began.

We also find that CPT was prejudiced by the Army's denial of its request. The three other offerors which were granted extensions were given approximately one additional month after the Hannover trade fair to prepare for their demonstrations. In contrast, CPT was required to go forward with its demonstration on Monday, April 29, directly after the conclusion of the trade fair on Friday, April 26, with only the intervening weekend to prepare its equipment and personnel.

CPT maintains that the lack of time hindered its ability to make a proper presentation of its product. CPT argues that because it offered an innovative and sophisticated software product, a clear explanation and presentation of the software's capabilities were crucial to proper evaluation of CPT's proposal by the Army evaluation team, many of whom did not have a technical background. CPT contends that a lack of familiarity with its software, not deficiencies in the software, accounted for the Army's decision to exclude CPT's technical proposal from the competitive range. The Army's technical evaluation concluded, for example, that CPT's software product was only a "tool" to be used to create software programs, and therefore did not meet the RFP requirement for existing demonstrable software. According to CPT, however, its product is a fully

developed program, not simply a tool to write the Army's own programs, which operates in a different manner than other currently available software, and that the Army's misunderstanding of CPT's product could have been avoided if CPT had been given the time to prepare a more detailed presentation that the Army would have more easily understood. The protester complains that because of its commitment to the Hannover fair it had no time to tailor such a non-technical briefing.

As a general matter, any offeror is likely to benefit by having more time to prepare for a demonstration of its product. This is particularly true here, where the demonstration involves complex programs and extensive functions which, in CPT's case, were to be accomplished using innovative software with which the technical evaluators might not be familiar. Accordingly, we find that CPT was prejudiced by being denied the extension which the Army granted to the other offerors.

In view of our finding, we sustain the protest on this ground. By separate letter to the Army, we are recommending, as CPT requested, that the Army allow CPT to conduct another demonstration. The Army then should reevaluate CPT's proposal based on that demonstration and determine whether CPT should be included in the competitive range and allowed to submit a best and final offer.

CPT also raised other issues regarding the conduct of the demonstrations, principally challenging the Army's failure to notify CPT of the deficiencies found in its proposal and allow CPT a second chance to perform the demonstration, and the Army's failure to disclose until after the protest was filed a checklist of features used to evaluate CPT's proposal at the demonstration. We need not address these issues in view of our recommendation that CPT be given another opportunity to perform the demonstration.

#### Delegation of Procurement Authority

CPT also argues that the Army failed to obtain a DPA for this procurement as required by the Brooks Act. We find this argument without merit.<sup>1/</sup>

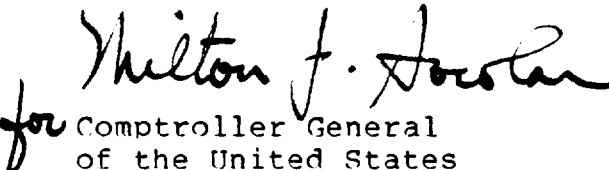
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<sup>1/</sup> The Army argues that the Brooks Act does not apply to this procurement and that the DPA issue was not timely raised. We need not address these arguments, however, since assuming the Brooks Act applies the protester's argument on the DPA issue is clearly without merit.

Under the Brooks Act, 40 U.S.C. § 759(a), GSA is given central authority over the acquisition of ADP resources by federal agencies. Under 40 U.S.C. § 759(b), GSA may delegate this authority to the federal agencies themselves. The Federal Information Resources Management Regulation (FIRMR) establishes blanket DPAs from GSA to contracting agencies where the value of the procurement is below designated dollar ceilings; for equipment, the ceiling is a purchase price of \$2.5 million (41 C.F.R. § 201-23.104-1(c)(1)); for software, \$1 million (41 C.F.R. § 201-23.104-2(c)(1)); and for maintenance, \$1 million annually (41 C.F.R. § 201-23.104-3(b)(1)).

We have examined in camera the best and final offer submitted by the proposed awardee and we agree with the Army that the prices proposed for the equipment, software and maintenance called for under the RFP do not exceed the designated dollar ceilings in the FIRMR. As a result, the Army was not required to obtain a specific DPA from GSA for this procurement. Accordingly, we deny this ground of the protest.

The protest is sustained in part and denied in part.

  
for Comptroller General  
of the United States